# In the Supreme Court of the United States

OCTOBER TERM, 1973

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No. 72-1693

CLIFTON L. BRIGHAM AND JANE G. BRIGHAM, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the Court of Claims (Pet. App. C) is reported at 470 F. 2d 571.

### JURISDICTION

The judgment of the Court of Claims was entered on December 12, 1972. A timely motion for rehearing or reconsideration was denied on March 16, 1973. The petition for a writ of certiorari was filed on June 14, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

### QUESTIONS PRESENTED

1. Whether the Commissioner's ultimate acceptance of petitioners' characterization of certain installment receipts as capital gains requires the reopening of

earlier years, now closed by the statute of limitations, for which similar receipts were treated as ordinary income.

2. Whether petitioners made valid timely claims for refund.

## STATUTORY PROVISIONS INVOLVED

The pertinent provisions of Sections 1311, 1312, 1313, and 6511 of the Internal Revenue Code of 1954, 26 U.S.C. 1311, 1312, 1313, and 6511, are set forth at Pet. App. A, 11-15.

## STATEMENT

The petitioners filed federal income tax returns for calendar years 1958 through 1961, in which they reported gains from their dispositions of stock in the Gage Structural Steel Corporation as capital gains. (The disposition of stock took place in 1952, but petitioners received installment payments for the stock during each of the years in question.) Upon examining the returns, an Internal Revenue Service agent classified the payments as ordinary income and adjusted petitioners' tax liabilities accordingly. The petitioners paid the additional tax and interest without protest.[1]

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[1]The additional amounts paid were as follows:

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| *Clifton L. and Jane G. Brigham:* | |
| 1958 | $1,304.63 |
| 1959 | 2,424.63 |
| 1960 | 629.43 |
| 1961 | 2,008.19 |
| *Jerome D. and Shirley K. Gage:* | |
| 1958 | $4,356.77 |
| 1959 | 6,974.58 |
| 1960 | 1,498.88 |
| 1961 | 3,276.33 |

Subsequently an Internal Revenue Service agent examined the 1962 federal income tax returns of Jerome D. and Shirley K. Gage and of Ralph H. and Nell D. Gage; again the proceeds from their dispositions of Gage stock were reclassified as ordinary income. Those petitioners formally protested this treatment and, following this Court's decision in *Commissioner* v. *Brown*, 380 U.S. 563, the Commissioner conceded that petitioners had properly treated their installment receipts during 1962 as capital gains.

Petitioners then filed claims for refund of the additional taxes and interest which they had paid for the years 1958 through 1961. The Commissioner disallowed these claims on the ground that, since they were filed more than two years after the payments were made and more than three years after the returns were filed, they were barred by the statute of limitations, Section 6511 of the Internal Revenue Code of 1954, 26 U.S.C. 6511.

In the court below, petitioners contended that, notwithstanding the statute of limitations, their taxable years 1958, 1959, 1960, and 1961 are open for refund claims under Sections 1311-1315 of the Internal Revenue Code that they alternatively are entitled to equitable recoupment of the additional taxes and in-

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| *Ralph H. and Nell D. Gage:* | |
| 1958 | $38,150.57 |
| 1959 | 62,917.55 |
| 1960 | 5,572.00 |
| 1961 | 19,932.62 |
| *Charles F. and Margaret B. Jarrard:* | |
| 1958 | $34,847.26 |
| 1959 | 65,547.28 |
| 1960 | 8,323.08 |
| 1961 | 18,536.45 |

terest they had paid for those years, and that, in any event, the statute of limitations had not run because the protests filed by Jerome D. and Shirley K. Gage and by Ralph H. and Nell D. Gage for the taxable year 1962 constituted informal claims for refund for all petitioners for their taxable years 1958 through 1961. The Court of Claims sustained the Commissioner's determination, and petitioners renew all their contentions here.

## ARGUMENT

1. The Court of Claims properly held that the Commissioner's ultimate acceptance of petitioners' characterization of their installment receipts as capital gains does not require the reopening of years now closed by the statute of limitations for which similar receipts were treated as ordinary income.

a. Insofar as is here relevant, Sections 1311 through 1315 permit the reopening of closed years only where a determination by the Commissioner affects the basis of property involved in prior transactions or results in the double inclusion of an item of gross income or the double disallowance of a deduction or credit. See Section 1312. Since the Commissioner's determinations with respect to petitioners' dispositions of stock did not affect the basis of the stock or result in a double inclusion or disallowance, petitioners did not meet the basic statutory requisites for the reopening of closed years.[2]

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[2]The decision below turned on a different point, *i.e.*, that the Commissioner had not maintained inconsistent positions as is also required before the mitigation provisions become applicable. See Section 1311(b). Upon motion for judgment on the pleadings, the government did not contest petitioners' implicit assertion that the characterization of the gains as ordinary or capital affected the basis of their stock. It is clear, however, that the mere characterization of the gains would have no affect whatsoever on the petitioners' basis.

The cases petitioners cite as in conflict with the decision below all involved determinations affecting the basis of property or resulting in double inclusion of income or double disallowance of deductions; thus the differences in result to which petitioners point stem from the fact that the elementary requisites for the application of the mitigation provisions of Sections 1311 through 1315 were met in the other cases and not met here. The asserted conflict does not exist.

b. As the Court of Claims properly noted, "the function of the doctrine [of equitable recoupment] is to allow the taxpayer to *reduce* the amount of a deficiency recoverable by the Government by the amount of an otherwise barred overpayment of the taxpayer" (Pet. App. C, 11). No deficiency has been asserted against petitioners for any open years, so that, for the reasons stated in the opinion below (Pet. App. C, 11-13), there is no occasion for the application of that doctrine here.

2. We also rely upon the reasoning of the Court of Claims (Pet. App. C, 13-14) in urging that petitioners' alleged informal claims of refund did not fulfill the purposes of formal refund claims and therefore did not stop the running of the statute of limitations.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1973.